

NO. 75-992

Supreme Court, U. S.

FILED

JAN 3 1976

MICHAEL RUDAK, JR., CLERK

**In the
Supreme Court of the United States
OCTOBER TERM, 1975**

**CARLOS M. MARTINEZ,
Petitioner**

versus

**UNITED STATES OF AMERICA and JOHN T.
RUSSELL, Special Agent, Internal Revenue
Service,
Respondents**

**APPENDIX TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**W. B. "Bennie" House, Jr.
Mayhe, House & Bobbet, Inc.
711 Main Street - Seventh Floor
Houston, Texas**

ATTORNEYS FOR PETITIONER

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FILED: Feb. 10, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent
Internal Revenue Service,

Petitioners

v.

TRANSCONTINENTAL ARTIST
CORPORATION, ET AL.,

Respondents

MISCELLANEOUS

NO. 75-H-2

Edward B. McDonough, Jr., United States Attorney,
John T. Johnson, Assistant United States Attorney,
Houston, Texas, Richard A. Scully, Department of
Justice, Washington, D.C., for petitioners.

John Brown and Charles E. Orr, Houston, Texas,
for respondents.

BENCH RULING FROM LOWER COURT

On February 10, 1975, the Court convened to conduct a
show cause hearing to determine whether respondent Carlos
M. Martinez, also known as Charles Martinez, should comply

with summonses issued by the Internal Revenue Service
(IRS) to respondent as custodian of eight corporations or
entities believed to possess certain corporate records con-
taining information pertinent to an investigation of poten-
tial civil tax liability of Mr. Martinez. Testimony was heard,
and exhibits were offered into evidence. Some of the exhib-
its were not properly certified, and the Court conditionally
admitted these documents pending their proper certification.
It is understood that the Court's determination of the issues
raised in the petition of the Internal Revenue Service is con-
ditioned upon prompt certification of the subject documents,
which should be obtained immediately by appropriate repre-
sentatives of the petitioner.

After considering the evidence proffered and the appli-
cable law, the Court concludes that Mr. Martinez should be,
and he hereby is, ordered to comply in all respects with the
eight summonses issued on July 31, 1974, pertaining to the
corporate records of Transcontinental Artist Corporation,
General Ornament Corporation, Studio Theater of San
Antonio, Inc., Studio Theater of Austin, Inc., Studio Theater
of Corpus Christi, Inc., Studio Theater of El Paso, Inc.,
Studio Theater of Fort Worth, Inc., and Cine 16 of Dallas,
Inc. The Court issues the following bench ruling to elaborate
upon its reasons for this holding. The Court reserves the
right to expand upon this ruling, which has been issued on
the same afternoon as the hearing was conducted for the con-
venience of the parties, to incorporate formal findings of
fact and conclusions of law, with full citation to case authori-
ty, if appropriate.

Respondent Martinez contends that the above-named
corporations or entities may not really be corporations, that
Mr. Martinez is appearing solely in his individual capacity,
and that Mr. Martinez will neither "admit nor deny" that he

is custodian of the records of these "entities", for fear that by doing so, he will incriminate himself and become subject to criminal prosecution. Mr. Martinez further contends that by producing the records alone, the act of production would constitute "speaking action" which could be held to incriminate him in violation of his Fifth Amendment privilege against self-incrimination. In support of his legal position, Mr. Martinez directs the Court's attention to: *Morgan v. Thomas*, 448 F.2d 1356 (5th Cir. 1971); *United States v. Pollock*, 201 F.Supp. 542, from the Western District of Arkansas in 1962, and *Curcio v. United States*, 354 U.S. 118 (1957). Respondent has additionally pointed to *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970), as supportive of his position.

The instant case involves a civil investigation conducted by the Internal Revenue Service to determine whether respondent Martinez should be liable for further taxes. The uncontroverted testimony of the Internal Revenue Service Special Agent who testified in this case indicates that the investigation is presently being, and has always been, conducted solely to determine whether Mr. Martinez owes more tax. At no time has any criminal investigation been put into operation.

In pursuit of its investigation, the IRS through its Special Agent issued summonses on July 31, 1974, requesting only production of certain corporate records of the eight above-named corporations or entities. The summonses were addressed to respondent Martinez as custodian for these corporations, either as corporate president, or as general manager. The Court concludes that those reasons prompting the request for production of the corporate records were good faith reasons and have occurred well prior to any possible

criminal prosecution. In fact, there has been no evidence to indicate that any criminal prosecution will ever occur.

Respondent Martinez challenges service of the summonses on him. He contends that he is not the custodian, and that the United States, as petitioner, has the burden to demonstrate that he is the custodian, and that he must produce the records. The Court cannot agree with even this threshold contention of the respondent. The Court concludes that, according to the holding of the United States Supreme Court in *Donaldson v. United States*, 400 U.S. 517, at page 536, when an internal revenue service summons is issued in aid of an investigation and is issued in good faith and prior to any recommendation for a criminal prosecution, the respondent to the summons must either comply or demonstrate the deficiencies of the summons. The burden so to prove deficiencies is on the respondent.

To the Court, the burden is therefore on the respondent in the instant case to demonstrate the deficiencies of the summons. Such imposition of the burden not only comports with the *Donaldson* case, but also comports with the interpretation of that case by the United States Court of Appeals for the Fifth Circuit in *United States v. Newman*, 441 F.2d 165 (5th Cir. 1971) (see especially at page 169). Respondent contends that the summons is deficient because he should not be served with it. Respondent neither admits nor denies that he is the proper custodian for the records, but only states that for him even to produce the records would be in violation of his Fifth Amendment privilege against self-incrimination, and he contends further that the Fifth Amendment protects him from saying or doing anything which he feels would incriminate him.

The Court is totally at a loss to understand how a person

who refuses to acknowledge his affiliation with a corporation or entity has the right to claim any privilege regarding records which belong to the corporation. The same holds true for corporate "entities", or any organization holding itself out to be an independent entity and formally organized with regard to filing federal corporate income tax returns, or filing state corporate charters.

Even though proper invocation of the privilege thus remains in doubt in this case, the Court concludes that there is no merit to this position. The uncontroverted testimony offered before this Court indicates that in conversation with the special agent from the IRS, after being fully informed of his constitutional rights to remain silent, respondent Martinez indicated that he was corporate president of General Ornament Corporation, and general manager of the other six named corporate "entities". Other official state documents indicate that he was corporate president of Transcontinental Artists Corporation. The Court concludes that Mr. Martinez was indeed, and in fact, the custodian of the records of these entities.

The Court further concludes, on the basis of the recent Supreme Court holding in *Bellis v. United States*, 414 U.S. 907 (1974), that whether Transcontinental and General Ornament are still in existence or not, and whether the other six named "entities" were ever incorporated or not, all eight of these entities are independent entities, each having an established institutional identity independent of the respondent Martinez.

With summonses thus properly issued as to these entities, and with Mr. Martinez as their custodian, it must next be determined whether, and the extent to which, if at all, Mr.

Martinez is entitled to invoke a Fifth Amendment privilege as to the matters contained in the requested records. Respondent Martinez does not contend that the records are his personal records. It is well-settled that an individual cannot rely upon the privilege provided in the Fifth Amendment to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally. See *Wilson v. United States*, 221 U.S. 361 (1911); and *United States v. White*, 322 U.S. 694 (1944). It is further well-settled, under the *Curcio* case, see *Curcio v. United States*, 354 U.S. 118 (1957), see especially page 125, that a custodian of corporate records overrides any self-incrimination privilege when he accepts his custodianship.

In *Curcio* the Supreme Court went on to hold, in response to a contention which has been similarly raised by respondent in this Court today, "that the Custodian's act of producing books or records in response to a subpoena is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination." Such an act is what is complained of today by respondent, and it is such an act that this Court is ordering the respondent, as custodian for the records of the eight entities mentioned above and in the summonses, to produce. The Court does not find, as the Supreme Court discussed in *Curcio*, that the IRS is attempting to compel the custodian to disclose the location of documents he has failed to produce. Rather, the Court concludes that what is requested by the summonses does pertain solely to corporate records, and in all matters the summonses comply with Supreme Court directives in *Donaldson*, *Curcio* and *Bellis*, as

interpreted by the Fifth Circuit in *Newman*, and the United States Court of Appeals for the Sixth Circuit in *United States v. Held*, 435 F.2d 1361(6th Cir. 1970).

The *Pollock* case cited by respondent is inapposite to the question now before the Court because the Government there was moving for criminal contempt for failure to comply with a court order directing delivery of certain records. The issue here does not reach that point, and the IRS herein seeks only to have the respondent Martinez comply with its summonses as custodian of corporate records. The Court would further note that *Pollock*, a district court case, may not be good law any longer in view of the recent Supreme Court decisions pertaining to standards applicable to criminal contempt proceedings. *Morgan v. Thomas*, another case cited by respondent, is also inapposite to the instant case, ruling as it does on a habeas corpus proceeding arising out of enforced compliance with a state court ruling enforcing a contract for surety governed by state law. The present case involves a question of federal law which has directly been ruled upon by the Supreme Court and the Fifth Circuit. The Court does not consider the above two cases, or any other case cited by respondent, to further his position, or do anything more than strengthen the position of the IRS.

The Court therefore directs that the petition to enforce the summonses referred to in this case should be, and hereby is, granted. The respondent Martinez is directed to comply immediately by producing all of the requested materials described in the summonses.

IT IS SO ORDERED.

DONE at Houston, Texas, this 10th day of February, 1975.

s/ Carl O. Bue, Jr.
United States District Judge

ORDER STAYING ENFORCEMENT OF BENCH RULING
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FILED: Feb. 20, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent
Internal Revenue Service,
Petitioners,

MISCELLANEOUS

v.

NO. 75-H-2

TRANSCONTINENTAL ARTIST
CORPORATION, ET AL.,

Respondents

Edward B. McDonough, Jr., United States
Attorney, John T. Johnson, Assistant
United States Attorney, Houston, Texas,
Richard A. Scully, Department of Justice,
Washington, D. C., for petitioners.

John J. Browne and Charles E. Orr, Houston,
Texas, for respondents.

ORDER STAYING ENFORCEMENT OF BENCH RULING

The motion of respondent Carlos M. Martinez to stay

enforcement of this Court's Bench Ruling of February 10, 1975, pending appeal is granted at this time. On February 10, this Court granted the motion of the petitioner to enforce summonses issued by a special agent of the Internal Revenue Service and overruled respondent Martinez' attempted invocation of a Fifth Amendment privilege.

Respondent now seeks to appeal this Bench Ruling, see Respondent's Notice of Appeal (February 14, 1975), and has requested this Court to stay enforcement of its order pending appeal. See Respondent's Motion to Stay (February 14, 1975). Respondent contends that normal enforcement of the order would effectively render useless the utilization of the appellate process.

Upon reviewing applicable law, the Court has concluded that the February 10 Bench Ruling is a final appealable order. 28 U.S.C. § 1291; see *Falsone v. United States*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953); *United States v. Secor*, 476 F.2d 766 (2d Cir. 1973). Appeal is therefore proper at this time, and the Court agrees that by not staying its order, this Court would render any appellate relief meaningless for respondent. The Court concludes that the status quo prior to this Court's ruling of February 10, should be maintained pending appeal. Neither party should take any action which would prejudice or be detrimental to the interests of the other.

The Court directs counsel for the petitioner to notify the Court if the appeal is not diligently pursued by filing an appropriate request for rescission of this stay.

DONE at Houston, Texas, this 20th day of February, 1975.

s/ Carl O. Bue, Jr.
United States District Judge

NOTICE OF APPEAL OF CARLOS M. MARTINEZ

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Filed: Feb. 14, 1975
Clerk, U.S. District Court
Southern District of Texas
V. Bailey Thomas, Clerk
By: (Signature Illegible)
Deputy

UNITED STATES OF AMERICA and
JOHN T. RUSSELL, Special Agent of
the Internal Revenue Service,
Petitioners MISC. C.A. NO. 75-H-2

vs.
TRANSCONTINENTAL ARTIST
CORPORATION; GENERAL
ORNAMENT CORPORATION, et al.
Respondents

NOTICE OF APPEAL

Carlos M. Martinez, a Respondent in the above entitled cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order entered February 10, 1975.

Respectfully submitted,

s/ John J. Browne
JOHN J. BROWNE
Attorney for Respondent Martinez
609 Fannin Street Suite 629
Houston, Texas 77002 224-5341

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served on the Petitioners by hand delivering same to the office of Anna Stool, Assistant United States Attorney, 515 Rusk Avenue, Houston, Texas, on this the 14th day of February, 1975.

s/ John J. Browne
JOHN J. BROWNE

TRUE COPY I CERTIFY
ATTEST:
V. BAILEY THOMAS, Clerk
BY: S/ (Signature Illegible)
Deputy Clerk
(SEAL)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 75-1787

Summary Calendar*

**UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees
versus**

**TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,**

**CARLOS M. MARTINEZ,
Respondent-Appellant**

**Appeal from the United States District Court for the
Southern District of Texas**

(August 5, 1975)

**Before BROWN, Chief Judge, GODBOLD and GEE, Circuit
Judges.**

PER CURIAM: AFFIRMED. See Local Rule 21.¹

*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

1- See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

PETITION FOR REHEARING
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1787

Filed: Oct 3, 1975
 U.S. Court of Appeals
 Edward W. Wadsworth
 Clerk

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
 Special Agent of the Internal Revenue Service,

Petitioners-Appellees,

versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,

Respondents,

CARLOS M. MARTINEZ,

Respondent-Appellant.

Appeal from the United States District Court for the
 Southern District of Texas

ON PETITION FOR REHEARING

(October 3, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit
 Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in
 the above entitled and numbered cause be and the same is
 hereby denied.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH OFFICE OF THE CLERK
 Clerk October 14, 1975 600 Camp
 New Orleans, La. 70130
 (504) 527-6514

Mr. V. Bailey Thomas, Clerk
 U. S. District Court
 P. O. Box 61010
 Houston, Texas 77208

RE: No. 75-1787 - U. S. A., et al vs. Transcontinental
 Artist Corporation, et al; Carlos M.
 Martinez

(District Court No. CA 75-H-2)

Dear Sir:

(XX) Enclosed is a certified copy of the RULE 21 DECISION judgment of this Court in the above case issued as and for the mandate.

() Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

() We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

() Copy of the Court's opinion.

(X) Original record on appeal or review. & Suppl.

(X) Original exhibits.

(X) Bill of Costs approved by this Court.

() The judgment provides that appellee pay the costs in this Court. Since the case was docketed in forma pauperis without pre-payment of fees and costs, the Clerk's docketing fee of \$25.00 is now payable to this office by appellee, and by copy of this letter counsel is being so advised.

Very truly yours,

Edward W. Wadsworth, Clerk

By s/ Carol G. LeSage
Deputy Clerk

Enc. (BILL OF COSTS ONLY)

cc: Messrs. John J. Brown

Charles E. Orr

Mr. W. B. "Bennie" House, Jr.

Mr. Edward B. McDonough, Jr.

Hon. Scott P. Crampton

Messrs. Gilbert E. Andrews

Robert E. Lindsay

Robert A. Bernstein

MANDATE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Clerk, U. S. District Court
Southern District of Texas

Filed: Oct 17, 1975

V. Bailey Thomas, Clerk

By: (Signature Illegible)

Deputy

DO NOT PUBLISH

MISC. NO. 75-H-2

No. 75-1787

Summary Calendar*

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,

Petitioners-Appellees,

versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,

Respondents,

CARLOS M. MARTINEZ,

Respondent-Appellant

Appeal from the United States District Court for the
Southern District of Texas

(August 5, 1975)

Before BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.¹

Costs are taxed against respondent-Appellant.

* Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

1 - See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

Issued as Mandate: Oct. 14, 1975

A true copy

Test: Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit

By: s/ Carol G. LeSage
Deputy

New Orleans, Louisiana

Oct 14, 1975

ORDER DENYING APPLICATION

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

U. S. Court of Appeals
Filed: Oct 26, '75
Edward W. Wadsworth
Clerk

NO. 75-1787

UNITED STATES OF AMERICA and JOHN T. RUSSELL,
Special Agent of the Internal Revenue Service,
Petitioners-Appellees,

versus

TRANSCONTINENTAL ARTIST CORPORATION, ET AL.,
Respondents,

CARLOS M. MARTINEZ,
Respondent-Appellant

Appeal from the United States District Court for the
Southern District of Texas

ORDER: -

Treating appellant's motion for stay of mandate as an

application to recall and stay the mandate previously issued on October 14, 1975 pending the timely filing of a petition for writ of certiorari in the United States Supreme Court; IT IS ORDERED that the application be, and the same is hereby denied.

s/ Thomas Gibbs Gee
UNITED STATES CIRCUIT
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the Appendix to Writ of Certiorari has this day been served on Gilbert E. Andrews, U.S. Department of Justice, Washington, D.C.; Edward B. McDonough, Jr., U. S. Attorney, 515 Rusk Avenue, Houston, Texas 77701 and Hon. Robert H. Bork, Solicitor General, U. S. Department of Justice, Washington, D. C., 20530, by placing same in the U.S. Mail, postage prepaid, this 12th day of January, 1976.

W. B. "Bennie" House, Jr.